Supreme Court, U.S.
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No. 96-868

In the Supreme Court of the United States

OCTOBER TERM, 1996

JOHN CONLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, when the jury has returned a general verdict of guilty on a count charging a multiple-object conspiracy, the district court may determine which offenses were the objects of the conspiracy for purposes of imposing sentence under the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 92 F.3d 157. The district court's finding that petitioner committed both offenses that were charged as objects of the conspiracy (Pet. App. A29-A33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 1996. The petition for rehearing was denied on August 30, 1996. Pet. App. A35-A36. The petition for a writ of certiorari was filed on November 26, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiring to commit an offense against the United States, in violation of 18 U.S.C. 371; and of the substantive offense of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. He was sentenced to consecutive prison sentences of 60 months on each count and fined $1 million. The court of appeals affirmed. Pet. App. A1-A28.

1. The evidence showed that petitioner owned the largest video poker machine business in the Pittsburgh, Pennsylvania area. He operated his gambling business by purchasing video poker machines equipped for gambling and putting them in business establishments knowing that they would be used for gambling. Petitioner expanded his gambling business by hiring employees to solicit new locations, to move and service his machines, and to collect his share of the proceeds. Petitioner also purchased his own buildings and businesses to house his machines and paid salaries to his employees at these locations. Between 1985 and 1990, he or his employees deposited more than $10 million in bank accounts, approximately 93-94% of which was derived from video poker machine gambling. Pet. App. A3-A4.

Petitioner took steps to thwart investigation of his gambling activities by local, state, and federal law enforcement personnel. For example, petitioner reorganized his gambling business to conceal his involvement; he had informants warn him of impending law enforcement raids so that the video poker machines could be removed; he instructed his employees on a

new method of taking readings from the machines to prevent law enforcement authorities from obtaining the readings; he ceased having the gambling proceeds delivered to his office; and he instituted a policy barring location owners and operators from making payoffs to persons they did not know. On one occasion, petitioner secretly entered a location secured by United States marshals and removed knock-off devices from video poker machines seized from him. Pet. App. A5-A6.

2. After the district court denied petitioner's request for a special verdict on the conspiracy count that would have required the jury to express its finding with respect to each charged object offense, the jury entered a general verdict of guilty on that count. Section 1B1.2(d) of the Sentencing Guidelines provides that "[a] conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." Application Note 5 of the Guideline addresses the situation, such as that presented here, in which the verdict does not establish which offense or offenses was the object of the conspiracy. The note states that "[i]n such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense." The Guidelines provide that the sentencing court's decision of whether the defendant committed an object offense is governed by the reasonable-doubt standard. See United States Sentencing Comm'n, *Guidelines Manual*, App. C., Amend. 75 (1995).

At sentencing, the district court, employing the reasonable-doubt standard, found that petitioner conspired to commit both of the object offenses alleged in the conspiracy count—conducting an illegal gambling business and money laundering. Pet. App. A33. The court determined that petitioner conspired to commit money laundering notwithstanding the jury's inability to reach a verdict on the substantive money laundering offenses charged against him. *Id.* at A8-A9.

Having found that petitioner conspired to commit both the gambling object and the money laundering object, the district court grouped the two offenses pursuant to Section 3D1.2(b) of the Guidelines. Pet. App. A9. With respect to grouped counts, courts must determine the base offense level for the most serious of the counts in the group. Guidelines § 3D1.3. Because the base offense level for money laundering under Section 2S1.1 is greater than that for conducting an illegal gambling business under Section 2E3.1, the court used the base level contained in the money laundering guideline. The court found that petitioner had conspired to launder in excess of $10 million. Accordingly, the court increased the base offense level under Section 2S1.1(b)(2) by nine levels. After adjusting the offense level upward an additional six levels for role in the offense (Guidelines § 3B1.1(a)) and obstruction of justice (Guidelines § 3C1.1), the court sentenced petitioner to 60 months' imprisonment on both counts, the maximum sentences allowed under 18 U.S.C. 371 and 18 U.S.C. 1955. Because the maximum sentences authorized by these statutes were less than the minimum sentences called for by the Guidelines, the court directed that

petitioner serve the sentences consecutively. See Pet. App. A9-A10 (applying Guidelines § 5G1.2(d)).

3. On appeal, petitioner contended that his Sixth Amendment right to a jury trial and his Fifth Amendment right to due process were violated when the district court calculated his offense level under the more severe money laundering guideline, because the jury did not specify the object of the conspiracy for which it convicted him, and because the jury failed to reach a verdict on the substantive money laundering counts. Pet. App. A10.

With respect to petitioner's Sixth Amendment claim, the court of appeals began by observing that, in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), this Court "permitted a state to treat conduct which arguably was an element of a criminal offense, the visible possession of a weapon during certain offenses, as a sentencing factor." Pet. App. A15. The court then concluded that "making the object of a conspiracy charged under 18 U.S.C. § 371 a matter for the sentencer rather than an element of the crime" likewise does not violate the Sixth Amendment. *Id.* at A17. The court reasoned (*id.* at A16-A17) that

> [i]f * * * it were constitutionally impermissible to treat the object of a multi-object conspiracy indictment as a sentencing factor rather than as an element of the crime, then it is difficult to understand how [this Court in *Griffin* v. *United States*, 502 U.S. 46 (1991)] * * * could have permitted a conspiracy conviction to stand when there was insufficient evidence to support a conviction for one of the objects. After all, if each object of the conspiracy had been an element of the crime then under well-established law the

> defendant in *Griffin* would have been entitled to an acquittal since the proofs could not support the charge that she conspired with respect to one object.

In support of its holding, the court cited *United States* v. *Martinez*, 924 F.2d 209, 211 (11th Cir.), cert. denied, 502 U.S. 870 (1991), for the proposition that, because the Guidelines do not alter the maximum sentence for an offense but merely limit the court's discretion in selecting a penalty within the statutory range, "there is no constitutional violation in permitting the district court to consider relevant conduct for which the defendant was neither charged nor convicted, so long as proof of that conduct is supported by reasonable indicia of reliability." Pet. App. at A17-A18 (quoting *Martinez*, 924 F.2d at 211).

The court of appeals also rejected petitioner's due process claim. The court observed that the state statute upheld by this Court in *McMillan* required that the existence of the sentencing factor at issue there—whether the defendant visibly possessed a gun during the crime—be determined by a preponderance of the evidence. Pet. App. A20. The court then concluded that by determining the objects of the conspiracy beyond a reasonable doubt, the district court here "met whatever procedural standard which might have been required." *Id.* at A21.

ARGUMENT

Petitioner contends that the procedure set forth in Section 1B1.2 of the Guidelines, as explained in Application Note 5, violates the Due Process Clause of the Fifth Amendment and the Sixth Amendment jury trial right because it authorizes the district court rather than the jury to determine the object of a

conspiracy. Accordingly, petitioner argues that the district court exceeded its constitutional power at sentencing by determining itself that he conspired to commit both the gambling and money laundering objects, and then in sentencing him by employing the higher base offense level for money laundering. In petitioner's view, when faced with a general verdict of guilty in a multiple-object conspiracy case, the sentencing court is required to impose a sentence based on the least serious object. Petitioner further contends that the result in this case would have been different under decisions by the Eighth and Tenth Circuits and that this Court should grant certiorari because of that conflict. Those contentions are without merit.

1. In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court reaffirmed the long-established rule that a general verdict of guilty on a multiple-object conspiracy count may stand "so long as it [is] legally supportable on one of the submitted [objects]—even though that [gives] no assurance that a valid [object], rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. It is also well-established that the legislature may enumerate a factor to be found by the sentencer that was not stated as an element of the offense on which the trier of fact convicted the defendant. See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 93. Furthermore, a sentencing court has discretion to take into account a range of information—including evidence introduced at trial for offenses on which the defendant was ultimately acquitted—to determine the appropriate sentence for offenses on which the jury convicted the defendant. *United States* v. *Watts*, No. 95-1906 (Jan. 6, 1997) (per curiam), slip op. 3. From these decisions, it follows a

fortiori that the district court in sentencing the defendant may also consider charged conduct with respect to which the jury is not required to make a finding in order to convict.

In determining at sentencing that petitioner conspired to commit the money laundering object, the district court did not invade the province of the jury and decide an element of the offense. The general conspiracy statute pursuant to which petitioner was convicted, 18 U.S.C. 371, makes it a crime to conspire to commit any offense against the United States and to perform an overt act to effect the object of the conspiracy. Accordingly, an element of a multiple-object conspiracy offense is that the defendant conspired to commit one or more of the charged objects. The jury in this case could not have convicted petitioner on the conspiracy count had it not found beyond a reasonable doubt all of the elements of conspiracy specified in Section 371. The district court did not perform a jury function and determine an element of the offense, however, when it concluded during the sentencing phase that petitioner conspired to commit the money laundering object.

The Sentencing Commission could have chosen any of a number of ways for courts to calculate the sentence for a Section 371 conspiracy. The fact that it decided to base the sentence on a factor that happens to mirror a determination made by the jury does not mean that the factor is any less an issue for the court at sentencing than if the sentence were governed by some other factor not determined by the jury, such as the number of participants in the conspiracy. In a multiple-object conspiracy case, it is the jury's role under the Sixth Amendment to determine whether the defendant is guilty of conspiring to commit a

charged object; once that determination is made, it is properly the court's role to determine which charged objects were sufficiently proved to serve as a basis for the sentence. See *McMillan* v. *Pennsylvania*, 477 U.S. at 93 ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."); *United States* v. *Chapple*, 985 F.2d 729, 731 (3d Cir.) (the district court is not bound by the jury's findings regarding sentencing factors), cert. denied, 508 U.S. 980 (1993). In applying the Guidelines in this case, therefore, the court below committed no error under the Fifth and Sixth Amendments.

2. Petitioner cites (Pet. 22-23) several cases holding that the punishment imposed after a general verdict of guilty in a multiple-object conspiracy case, where the punishment authorized by the conspiracy statute depends on the punishment authorized for the object offenses, may not exceed the maximum penalty authorized by statute for the less serious object offense. See, *e.g.*, *United States* v. *Orozco-Prada*, 732 F.2d 1076, 1083-1084 (2d Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Quicksey*, 525 F.2d 337, 340 (4th Cir. 1975), cert. denied, 423 U.S. 1087 (1976). The underlying concern in these cases, which were decided before the advent of the Sentencing Guidelines, arises when a court attempts to impose a sentence above the statutory maximum applicable to the crime for which the defendant was convicted. As the court of appeals explained, that danger is not present here. Pet. App. A13-A14. The maximum statutory sentence to which petitioner is exposed does not depend on the punishment authorized under the Sentencing Guidelines for the object offenses; rather, the maximum sentence has been imposed by Section 371

as five years—regardless of the object on which the jury relied to convict the defendant under Section 371.[1]

Petitioner cites (Pet. 18-20) two cases as conflicting with the decision below and as support for his position. In both *United States* v. *Pace*, 981 F.2d 1123 (10th Cir. 1992), cert. denied, 507 U.S. 966 (1993), and *United States* v. *Owens*, 904 F.2d 411 (8th Cir. 1990), the defendants were charged with conspiring to traffic in "methamphetamine/amphetamine" under 21 U.S.C. 846, the conspiracy provision applicable to drug offenses.[2] The juries returned a general verdict that did not specify which drug was the object of the conspiracy. The district courts in those cases found that the drug involved was methamphetamine, and consequently sentenced the defendants under the Sentencing Guidelines to longer jail terms than would have been prescribed if the drug had been found to be amphetamine. The courts of appeals vacated the sentences, concluding that the defendants should have been sentenced under the guideline yielding the less

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[1] Section 371 of Title 18 provides, in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

[2] Section 846 of Title 21 provides, in pertinent part:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

severe penalty. 981 F.2d at 1130; 904 F.2d at 415. Both courts of appeals rested their holdings on the fact that it was not clear from the jury's verdict on which drug—methamphetamine or amphetamine—the convictions rested.

Pace and *Owens* are inapposite to the instant case.[3] First, the conspiracy provisions in 21 U.S.C. 846 and 18 U.S.C. 371 differ insofar as Section 846 directs the sentencer to impose the penalty applicable for the underlying substantive offense, whereas Section 371 provides generally that persons convicted under that provision shall receive a maximum penalty of five years' imprisonment irrespective of the penalty prescribed for the underlying offense that was the object of the conspiracy. That distinction is important, because a conviction under Section 846 points to the penalty imposed by the underlying object offense, whereas Section 371 does not. Because *Pace* and *Owens* arose under Section 846, they do not present a direct conflict with petitioner's case, which arises under Section 371.

Second, it is questionable whether *Pace* and *Owens* represent definitive statements of law in the Eighth and Tenth Circuits on whether a jury—as opposed to the sentencing court—must find the requisite facts

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[3] Petitioner also cites (Pet. 18) as conflicting *United States* v. *Bush*, 70 F.3d 557 (10th Cir. 1995). That case is distinguishable because it involved the adequacy of a guilty plea, and the issue was whether the defendant had intentionally pleaded guilty to the charge under 21 U.S.C. 846 involving a particular drug. Although the court of appeals relied on its analysis in *Pace*, 70 F.3d at 559-560, the issue of a defendant's intent to plead guilty to a Section 846 conspiracy has no bearing on what facts the jury is required to find beyond a reasonable doubt in a prosecution brought under 18 U.S.C. 371.

to sustain imposition of a sentence for conspiracy that rests on a conviction for acts whose objects were violations of substantive offenses. Other cases in those circuits support the government's position that the sentencer may find the requisite facts, as the district court did below. For example, in *United States* v. *Koonce*, 884 F.2d 349, 352-353 (8th Cir. 1989), the evidence clearly established that the defendant was involved in methamphetamine trafficking, but there was a dispute as to whether the methamphetamine was of the "Dextro" or "Levo" variety. As in *Owens*, different drug conversion ratios applied depending on the type of methamphetamine at issue. The sentencing court found it "more likely" that the methamphetamine was of the more severely penalized "Dextro" variety and sentenced the defendant accordingly. The court of appeals affirmed that finding as not clearly erroneous. *Id.* at 353. Cf. *United States* v. *Lopez*, 42 F.3d 463, 470 (8th Cir. 1994) ("For sentencing purposes, the court, not the jury, determines the quantity [of drugs]."); *United States* v. *Mabry*, 3 F.3d 244, 250 (8th Cir. 1993) (jury need not be instructed on quantity of drugs), cert. denied, 114 S. Ct. 1403 (1994); *United States* v. *Wood*, 834 F.2d 1382, 1389-1390 (8th Cir. 1987) (for sentencing purposes, the court, not the jury, determines drug quantity).

Similarly, in *United States* v. *Slater*, 971 F.2d 626 (10th Cir. 1992), the defendant contended that the district court incorrectly sentenced him on the basis of cocaine base instead of powder cocaine, which would have yielded a shorter sentence under the Guidelines. In rejecting that claim, the court of appeals relied on the district court's finding at sentencing that all of the transactions involved cocaine base. *Id.* at 639. See also *United States* v. *Deninno*, 29 F.3d 572, 580

(10th Cir. 1994) ("The government has the burden of proof and production during the sentencing hearing to establish the amounts and *types* of controlled substances related to the offense.") (emphasis added), cert. denied, 115 S. Ct. 1117 (1995).

Koonce, *Slater*, and the other cases cited above recognize that neither the type nor quantity of the illicit drug is an element of an offense under Section 841(a)(1), which prohibits only trafficking in "controlled substance[s]." Rather, it is exclusively in Section 841(b) that drug type and quantity are addressed, and that is for the purpose of prescribing penalties. See *Wood*, 834 F.2d at 1388-1389. Thus, in those cases, the courts correctly recognized that the sentencer may make factual findings that bear on the severity of punishment when the verdict on the offense of conviction does not entail a jury finding on those issues. Accordingly, petitioner is mistaken in contending that "he assuredly could not have been so sentenced by a court in the Eighth or Tenth Circuits." Pet. 30. Accord *United States* v. *Gomez*, 905 F.2d 1513, 1514-1515 (11th Cir. 1990), cert. denied, 498 U.S. 1092 (1991); *United States* v. *Levy*, 904 F.2d 1026, 1034 (6th Cir. 1990), cert. denied, 498 U.S. 1091 (1991); *United States* v. *Barnes*, 890 F.2d 545, 551 & n.6 (1st Cir. 1989), cert. denied, 494 U.S. 1019 (1990).

On the narrow issue actually presented by the petition—whether the sentence in this case under 18 U.S.C. 371 was constitutionally imposed—petitioner can present no conflict among the courts of appeals or other reason warranting this Court's review. Because divergent cases within the Eighth and Tenth Circuits arising under the drug conspiracy statute (21 U.S.C. 846) have no bearing on the proper outcome of this case, this Court should give those circuits an

opportunity to reconcile the tension among those precedents before granting review, or it should await an appropriate case that implicates that statute before granting plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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